UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN ALLAN SCERE,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
NY-0752-14-0157-C-1

DATE: February 21, 2023

THIS ORDER IS NONPRECEDENTIAL[1]

Jonathan Bell, Esquire, Garden City, New York, for the appellant.

Julie L. Kitze, Philadelphia, Pennsylvania, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member
Member Leavitt issues a separate dissenting opinion.

ORDER

¶1 The agency has filed a petition for review of the initial decision, which granted in part the appellant's petition for enforcement. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b). We find the agency in NONCOMPLIANCE.

BACKGROUND

¶2 The appellant served as a Federal Air Marshal (FAM) with the agency's Transportation Security Administration. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-I-1, Initial Appeal File (IAF), Tab 5, Subtab 4a. In January 2014, the agency removed him for his inability to meet a condition of employment; namely, his inability to maintain a Government travel card. *Id.*, Subtabs 4a, 4b. The appellant timely appealed his removal to the Board and requested a hearing. IAF, Tab 1.

¶3 Following the requested hearing, the administrative judge issued an initial decision mitigating the removal to a reassignment. IAF, Tab 23, Initial Decision (ID). Specifically, the administrative judge found that the agency proved its charge because the bank issuing the appellant's travel card cancelled it and declined to reinstate it upon the appellant's request; thus, the appellant was not able to meet a condition of employment as a FAM. ID at 4-19. She also found the appellant's affirmative defense that the agency violated his due process rights to be without merit and that the agency proved a nexus between the appellant's

conduct and the efficiency of the service. ID at 19-20. However, the administrative judge found that the agency's penalty was not entitled to deference because the deciding official did not properly consider the *Douglas* factors and, given the mitigating factors present, the penalty of removal was not appropriate.[2] ID at 20-22. Accordingly, the administrative judge ordered the agency to cancel the removal action, effective January 8, 2014, and assign the appellant to a position for which he was qualified in the agency's New York Field Office that did not require the use of a Government travel card and would result in "the least reduction in grade and pay" from his FAM position. ID at 22. She also directed the agency to pay the appellant the appropriate amount of back pay, interest, and other benefits. *Id.*

¶4 The agency appealed the initial decision to the full Board; however, the two sitting Board members could not agree on the disposition of the petition for review, and the initial decision became the final decision of the Board. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-I-1, Order (Sept. 9, 2016).

¶5 On November 28, 2016, the appellant timely filed a petition for enforcement in which he asserted that the agency failed to provide him with back pay, interest, and other benefits. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-C-1, Compliance File (CF), Tab 1. The agency responded that the Board lacked the authority to order the agency to provide back pay because the appellant was improperly reassigned, but in the event the Board had such authority, the appellant was not entitled to back pay because he was not ready, willing, and able to perform the duties of the position

[2] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board articulated a nonexhaustive list of factors to be considered when evaluating the penalty to be imposed for an act of misconduct.

to which the agency reassigned him.[3] CF, Tab 5 at 7-11. The administrative judge issued a compliance initial decision granting in part the appellant's petition for enforcement. CF, Tab 14, Compliance Initial Decision (CID). She found that the agency's removal action led to an unwarranted personnel action and that the agency was required to provide the appellant with the back pay and interest he was entitled to for the position to which he was reassigned, from the effective date of the removal until September 29, 2016, the date the agency ordered him to return to work following the issuance of the Board's order, less his earnings from outside employment. CID at 9-10. The administrative judge also found that the appellant did not make himself available for work until October 24, 2016; thus, he was not entitled to back pay for that time period. CID at 10. Accordingly, the administrative judge ordered the agency to provide the appellant with back pay from the period of January 9, 2014, until September 29, 2016, less outside earnings, as well as interest on the back pay amount and benefits. CID at 11; *see also* CF, Tab 16.

¶6 The agency has filed a petition for review of the compliance initial decision, which the appellant has opposed. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-C-1, Compliance Petition for Review File (CPFR File), Tabs 1, 3. The agency has filed a reply to the appellant's opposition. CPFR File, Tab 4. On review, the agency renews its arguments that the administrative judge did not have the authority to award the appellant back pay and that, even if the administrative judge did have such authority, the appellant is not entitled to any back pay. CPFR File, Tab 1. As set forth below, the agency's arguments are without merit.

[3] The appellant also filed a motion for attorney fees, which the administrative judge granted in part. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-A-1, Addendum Initial Decision (July 6, 2017). The agency's petition for review of that addendum initial decision will be addressed in a separate decision.

DISCUSSION OF ARGUMENTS ON REVIEW

The administrative judge had the authority to award back pay.

¶7 On review, the agency argues that the administrative judge did not have the authority to mitigate the penalty of removal and reassign the appellant to another position, absent an agency policy or regulation obligating reassignment; thus, the removal action was not unjustified or unwarranted, as is required to order back pay. CPFR File, Tab 1 at 8-13. The agency advanced the argument that the administrative judge did not have the authority to reassign the appellant in its petition for review of the initial decision mitigating the removal to a reassignment. CF, Tab 5 at 4-5. Enforcement proceedings are not to be used to revisit the merits of an underlying appeal, and we decline to do so here. *Henry v. Department of Veterans Affairs*, 108 M.S.P.R. 458, ¶ 24 (2008). We similarly decline to entertain the agency's arguments alleging error in the administrative judge's factual findings in the underlying appeal. *See* CPFR File, Tab 1 at 14-18.

¶8 The agency is subject to the Back Pay Act, codified as amended at 5 U.S.C. § 5596. 49 U.S.C. § 40122(g)(3). Section 5596(b) provides that an employee who "is found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action" is entitled to receive back pay in the amount that he would have earned during the period if the personnel action had not occurred, less any amounts he earned through other employment during that period, plus interest and other allowances. Because the administrative judge found in the underlying appeal that the penalty of removal could not be sustained and mitigated the removal to a reassignment, she properly concluded that the removal was unwarranted and that the appellant was entitled to back pay in the amount he would have earned had he been reassigned to the Program Assistant position, effective on the effective date of his removal, less any outside earnings. ID at 20-22; CID at 9-10; *see, e.g.*, *Clemons v. Smithsonian Institution*, 54 M.S.P.R. 1, 2 (1992) (approving of an award of back pay where the

administrative judge ordered the agency to cancel a removal action and mitigate the penalty to a suspension).

The administrative judge properly concluded that the appellant was entitled to back pay for the period prior to the date the agency ordered him to return to duty.

¶9 An employee is not entitled to back pay for any period during which he was not "ready, willing, and able" to perform his duties due to an incapacitating illness or injury, or for other reasons unrelated to the unjustified or unwarranted personnel action. *King v. Department of the Navy*, 100 M.S.P.R. 116, ¶ 12 (2005), *aff'd*, 167 F. App'x 191 (Fed. Cir. 2006); 5 C.F.R. § 550.805(c)(1), (2). The agency bears the initial burden of proving that it has provided the appellant with the appropriate amount of back pay. *King*, 100 M.S.P.R. 116, ¶ 13. When, however, the agency produces "concrete and positive evidence, as opposed to a mere theoretical argument" demonstrating that there is some substance to its affirmative defense that the appellant was not ready, willing, and able to work during all or part of the period for which he claims entitlement to back pay, the burden shifts to the appellant to show his entitlement to back pay. *Id.*

¶10 The agency contends that the appellant is not entitled to back pay at all because he allegedly "declined the [a]gency's repeated attempts to have him report" for duty. CPFR File, Tab 1 at 13-14. The record reflects that, pursuant to the administrative judge's interim relief order, the agency offered the appellant the Program Assistant position in December 2015, which the appellant accepted, and he notified the agency that he was eligible to report for duty in January 2016. CF, Tab 5 at 13-14, 17. An agency representative attested that she informed the appellant that she would provide him with a report date after he obtained the requisite security clearance. *Id.* at 13-14. The agency has represented that the appellant then declined to report for duty in January and July 2016, but it did not provide any evidence that it provided the appellant with a date to return to duty at either time, and he failed to do so. *Id.* at 20, 24. Accordingly, the agency has not presented anything more than a theoretical argument that the appellant was not

ready, willing, and able to work during this time period. *Cf. Hill v. Department of the Air Force*, 60 M.S.P.R. 498, 502 n.3 (1994) (in finding that the agency failed to establish its defense that the appellant was not ready, willing, and able to work, observing that the agency did not present any evidence that the appellant could not or would not have returned to his former duty station if he had been asked to do so).

¶11 However, on September 21, 2016, the agency ordered the appellant to report for duty on September 29, 2016, but he failed to return to work until October 24, 2016. CF, Tab 5 at 23. Contrary to the appellant's assertions, the agency provided concrete evidence that the appellant was working at outside employment during this latest time period and was not ready, willing, and able to work, and he failed to rebut the agency's evidence or provide any explanation for his failure to return to work during this period. CF, Tab 10 at 10; *see* CF, Tabs 9, 11; *cf. Naekel v. Department of Transportation*, 850 F.2d 682, 685 (Fed. Cir. 1988) (awarding back pay for 2 months after the agency ordered the appellant to report for duty when he acted expeditiously in giving notice to his interim employer and relocating his family to the new duty location). Accordingly, the administrative judge properly found that the appellant was only entitled to back pay for the period from January 9, 2014, until September 29, 2016, less outside earnings, as well as interest on the back pay amount and benefits. The compliance initial decision is affirmed.

ORDER

¶12 We ORDER the agency to submit to the Clerk of the Board, within 60 days of the date of this Order, satisfactory evidence of compliance with this decision. This evidence shall adhere to the requirements set forth in 5 C.F.R. § 1201.183(a)(6)(i), including submission of evidence and a narrative statement of compliance. The agency's submission must include proof that it has complied with the Board's Order by paying the appellant the correct amount of back pay,

interest on back pay, and other benefits under the Office of Personnel Management's regulations. The agency must serve all parties with copies of its submission.

¶13 We also ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order.

¶14 The agency's submission should be filed under the new docket number assigned to this compliance referral matter, MSPB Docket No. NY-0752-14-0157-X-1. All subsequent filings should refer to the compliance referral docket number set forth above and should be faxed to (202) 653-7130 or mailed to the following address:

Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

Submissions may also be made by electronic filing at the Board's e-Appeal site (https://e-appeal.mspb.gov) in accordance with its regulation at 5 C.F.R. § 1201.14.

¶15 The appellant may respond to the agency's evidence of compliance within 20 days of the date of service of the agency's submission. 5 C.F.R. § 1201.183(a)(8). If the appellant does not respond to the agency's evidence of compliance, the Board may assume that he is satisfied with the agency's actions and dismiss the petition for enforcement.

¶16 The agency is reminded that, if it fails to provide adequate evidence of compliance, the responsible agency official and the agency's representative may be required to appear before the General Counsel of the Merit Systems Protection Board to show cause why the Board should not impose sanctions for the agency's noncompliance in this case. 5 C.F.R. § 1201.183(c). The Board's authority to impose sanctions includes the authority to order that the responsible agency

official "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." 5 U.S.C. § 1204(e)(2)(A).

¶17 This Order does not constitute a final order and therefore is not subject to judicial review under 5 U.S.C. § 7703(a)(1). Upon the Board's final resolution of the remaining issues in the petition for enforcement, a final order shall be issued, which then shall be subject to judicial review.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF TRISTAN L. LEAVITT

in

John Allan Scere v. Department of Homeland Security

MSPB Docket No. NY-0752-14-0157-C-1

¶1 For the reasons set forth below, I respectfully dissent from my colleagues' decision to deny the agency's petition for review and affirm the compliance initial decision which granted in part the appellant's petition for enforcement and found the agency in noncompliance.

¶2 In the underlying initial decision in this case, the administrative judge upheld the charge of inability to meet a condition of employment, based on the appellant's having lost the ability to carry a Government credit card, a requirement of his Federal Air Marshal position. However, she mitigated the appellant's removal, ordering his reassignment to a position for which he was qualified and that did not require the use of a credit card, at the least reduction in grade and pay. The initial decision became the Board's final decision when the two sitting Board members could not agree on the proper disposition of the agency's petition for review. The agency appointed the appellant to the position of Program Assistant. Although the appellant did not report for duty, he subsequently filed a petition for enforcement seeking back pay, interest, and other benefits. In response, the agency repeated its argument that the administrative judge did not have the authority to mitigate the penalty of removal and reassign the appellant to another position, absent an agency policy or regulation obligating reassignment, and that therefore the removal action was not unjustified or unwarranted, a finding required to order back pay. In her compliance initial decision, the administrative judge was not persuaded by the agency's argument which it repeats in its petition for review of that decision.

¶3 In declining to consider this argument on review, the majority correctly states that enforcement proceedings are not to be used to revisit the merits of the underlying appeal. However, a party may raise subject matter jurisdiction at any time to collaterally attack a final judgment if the lack of jurisdiction directly implicates issues of sovereign immunity. *Gonzalez v. Department of Transportation*, 551 F.3d 1372, 1379-80 (Fed. Cir. 2009) (finding that the Board did not err in entertaining a collateral attack on its previous award of back pay to the appellant because the Board did not have jurisdiction to order the Federal Aviation Administration to pay back pay to its employees); *superseded by statute on other grounds as recognized in DeSantis v. Merit Systems Protection Board*, 826 F.3d 1369, 1371 (Fed. Cir. 2016); *Sobol v. U.S. Postal Service*, 68 M.S.P.R. 611, 614 (1995) (vacating the addendum initial decision for failure to demonstrate underlying jurisdiction where no statute or regulation conferred Board jurisdiction over the reduction-in-force reassignment of a nonpreference-eligible Postal Service employee). Here, the agency's argument that the Board lacked jurisdiction to award back pay because it did not have the authority to order the agency to reassign the appellant where no policy provided for such a reassignment implicates similar issues of sovereign immunity. Under these circumstances, the agency is not barred from collaterally attacking the Board's final decision directing the appellant's reassignment.

¶4 The record in this case, along with Board and court precedent, support a finding that the administrative judge in fact lacked the authority to order the appellant's reassignment. The Board has held that it does not have the authority to determine whether reassignment or a lesser penalty would be appropriate in the absence of an agency policy or regulation obligating reassignment. *See Radcliffe v. Department of Transportation*, 57 M.S.P.R. 237, 241 (1993) (finding that where the satisfactory completion of training is a condition of employment, and there is no agency policy manifested by regulation obligating reassignment, the Board has no authority to determine whether reassignment or a lesser penalty

would be appropriate); *cf. Penland v. Department of the Interior*, 115 M.S.P.R. 474, ¶ 10 (2010) (considering the fact that no rule or regulation required the appellant's reassignment upon the loss of his pilot authorization). This reasoning is predicated on the Federal Circuit's observation in *Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1581 (Fed. Cir. 1989), that when an appellant has failed to obtain a security clearance, it was not "aware of any other statutory requirement to find a position for an employee who fails to qualify for the job he was hired to do"; *see also Ryan v. Department of Homeland Security*, 793 F.3d 1368, 1373 (Fed. Cir. 2015) (stating that the court's decisions considering a mitigation analysis have involved penalties for misconduct rather than a loss of a required qualification for employment). Here, the administrative judge found, based on the deciding official's undisputed testimony, that the agency does not have a policy that required the appellant's reassignment following the loss of his ability to carry a Government credit card which resulted in his no longer meeting the requirements of his Federal Air Marshal position. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-I-1, Initial Decision at 13 (Nov. 30, 2015).

¶5 Because the administrative judge sustained the charge of failing to meet a condition of employment, and because she did not have the authority to order the appellant's reassignment, she was required to sustain the removal action. As such, she erred in finding that the removal action was unjustified and unwarranted, as required by 5 U.S.C. § 5596(b)(1) of the Back Pay Act. For that reason, the administrative judge did not issue an enforceable order that would entitle the appellant to back pay.

¶6 Accordingly, I would grant the agency's petition for review, reverse the compliance initial decision and deny the appellant's petition for enforcement.

/s/
Tristan L. Leavitt
Member